IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 13171 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SHRI RAVI TRADERS, THROUGH HIS PARTNER
Versus
STATE OF GUJARAT & ANR

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Appearance :
MR MP SHAH for Applicant
MS. KRUTI M SHAH for Applicant
MS DS PANDIT APP for RespondentNo.1 – State of Gujarat
None for Respondents No.2-3

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

Date : 30/11/2005

ORAL JUDGMENT

1.This Criminal Misc. Application is directed against the order passed by the learned Judicial Magistrate (F.C.), Sankheda in Criminal Case No.1078 of 1997 below Exhs.9 and 15 deciding that the complaint filed by the present applicant against the opponents for the offence punishable under Section 216 of the Gujarat Panchayat Act, 1993 was hit by Section 468 of the Code of Criminal Procedure and was liable to be dismissed. Criminal Revision Application No.335 of 2004 was preferred by the present applicant in the Court of Sessions Judge at Vadodara and the said Criminal Revision Application No.335 of 2004 came to be dismissed by the learned Presiding Officer, Fast Track Court No.13, at Vadodara on 29th July, 2005 and hence, this application for invoking inherent powers of this Court.

2.Section 216 of the Gujarat Panchayat Act, 1993 as was in force on the date of offence

pertained to evasion of payment of octroi. It was provided that any person, who with an intention of defrauding the panchayat causes or abets the introduction of or himself introduces or attempts to introduce within the octroi limits of concerned panchayat any animal or goods upon which payment of the octroi due on such introduction has neither, been made nor tendered, or who fails to comply with any direction given by the officer demanding the octroi levied by the authority of panchayat with reference to the introduction of animal or goods within the octroi limits will be liable to be prosecuted and punished, on conviction, with fine which may extend to ten times the amount of such octroi or to two rupees, whichever may be greater.

3.It is necessary to note that the said provisions of Section 216 of the Gujarat Panchayat Act, 1993 came to be deleted by Amending Act No.12 of 2001.

4.The present incident which according to the complainant is an offence occurred between 1st September, 1995 to 28th February, 1997. It was alleged in the complaint that cotton bags worth Rs.30.00 Crores were introduced by the present opponents No.2 and 3 i.e. original accused within the octroi limit and the accused did not tender or pay any octroi. A notice was issued by the complainant and, thereafter, on 2nd December, 1997, the present applicant preferred complaint in the Court of learned Judicial Magistrate (F.C.), at Sankheda. The process came to be issued against the accused and, thereafter, on 10th March, 1998, the accused filed applications at Exhs.9 and 15 stating that the complaints were time barred as per Section 468 of the Code of Criminal Procedure and were required to be dismissed. Both the Courts below held as above.

5.Learned advocate Ms.Kruti M. Shah for the applicant raised mainly three contentions at

this admission stage, against dismissal of the complaints by the learned Magistrate as confirmed by the learned Presiding Officer, Fast Track Court No.13, at Vadodara. Firstly, it was contended that Section 468 of the Code of Criminal Procedure would not be attracted as non-payment of octroi being continuing act generating fresh cause of action each day, the offence alleged is continuance one and provided for in Special Act of the State. Secondly, it was contended that alternatively if the offence complained of held not to be continuance one attracting provisions of Section 468 of the Code of Criminal Procedure, then also, this is a fit case wherein under Section 437, either delay ought to have been condoned or it ought to have been held in pursuance of the second part of Section 473 of the Code of Criminal Procedure that delay was required to be condoned in the interest of justice and cognizance even after expiry of a period of

limitation was necessary to be taken. Thirdly, it was contended that while issuing process to the accused, learned Magistrate took cognizance which inevitably results in condonation of delay in preferring the complaint having regard to the phraseology used in Sections 468 as well as in 473 of the Code of Criminal Procedure. Many decisions are relied upon by the learned advocate for the applicant which will be discussed later on.

6. It is not much in dispute that the complaint in question ought to have been filed within six months in pursuance of Section 468(2)(a) of the Code of Criminal Procedure. The complaint is preferred after three months of expiring of limitation period.

7. Evaluating and appreciating the contentions that the offences for which the accused was charged is continuance offences, it is necessary to consider the nature of continuing offence. Though Section 472 of the Criminal

Procedure Code provides that limitation would not be applicable to continuing offence, but this expression has not been defined anywhere in the Code. The question whether given offence is continuing offence or not must depend upon the structure of penal provision which creates such offence and object which is intended to be achieved behind making any act an offence. Further continuing offence is one which is susceptible to continuance and distinguishable from the one which is committed once and for all. Now focusing the language of Section 216 of Gujarat Panchayat Act, 1993 the same runs as under:-

> “**216**. Where any animal or goods passing into village are liable to the payment of octroi, any person, who with the intention of defrauding the village panchayat causes or abets the introduction of or himself introduces or attempts to introduce within the octroi

> limits of such village any such animal or goods upon which payment of the octroi due on such introduction has neither been made nor tendered, or who fails to comply with any direction given by the officer demanding the octroi levied by the authority of panchayat with reference to the introduction of the animal or goods within the octroi limits shall be punished, on conviction, with fine which may extend to ten times the amount of such octroi or to two thousand rupees, whichever may be greater."

From the language of the statute it becomes clear that essential element of constituting the offence is not evasion of octroi, but introduction of animal or goods within the limits of the octroi. Relevant phraseology employed is "whether causes or abets the

introduction of or himself introduces or attempts to introduce within the octroi limits" is the governing phrase of the penal provision and not making payment is necessary resulting damage from the above act which is made an offence. The offence envisaged is complete when goods or animals are introduced within octroi limits and that act is not continuing one. If the wrongful act or omission causes an injury which is complete, the same is not continuing wrong eventhough damage resulting from such wrong may continue but the default committed cannot be said to be continuous along with the damage. The payment tendered afterwards of the octroi may not absolve offender from culpability and, therefore, the offence in question, cannot be said to be a continuing offence, not attracting Section 468 of the Code of Criminal Procedure. Certain decisions cited by learned advocate for the applicant and relied upon, are clear instances of continuing

offences. In the matter of **STATE OF GUJARAT Vs. CHIMANLAL GORDHANBHAI**, as reported in **1978 GLH Vol.XIX 603**, this Court has held that evasion of sales-tax made an offence under the Sales Tax Act, was continuance offence. Likewise, in the matter of **BHAGIRATH KANORIA AND OTHERS Vs. STATE OF M.P.**, as reported in **AIR 1984 S.C. 1688,** the Apex Court has held that offence of non-payment of contribution by employer to provident fund was a continuing offence and Section 468 would not be attracted. In the matter of **PRAHLADBHAI RAJARAM MEHTA Vs. POPATBHAI HARIBHAI PATEL & ANR**, as reported in **1995 (2) G.L.R. 1752.** In para-37, this Court again held that the prosecution for wrongful retention of Company's property amounts to offence continuous one and provisions of Section 468 would not be attracted. These instances cited are not comparable instances to present one. Withholding contribution by the employer is an act continuous till the payment

is made. Likewise, the retention of Company's property and wrongful withholding, each giving rise to fresh cause of action each day. The evasion of sales-tax is also by nature an offence which is continuous one. While going through the provisions of Section 216 of the Gujarat Panchayat Act, it is clearly discernible that once the animals or goods are introduced within the octroi limits without tendering octroi, the offence is completed. Therefore, the offence prescribed under Section 216 of the Gujarat Panchayat Act, 1993 would not amount to an offence continuous one.

8. The two other submissions made by the learned advocate for the applicant cannot also be accepted. The certain decisions are cited on this respect also. In the matter of **STATE OF GUJARAT Vs. MAHENDRA MILLS LTD & ANR** as reported in **1997 (2) G.L.R. 1123**, this Court has held that under Section 473 of the Code of Criminal Procedure, even without application

delay can be condoned in the interest of justice. In the matter of **VANKA RADHAMANOHARI (SMT) Vs. VANKA VENKATA REDDY AND OTHERS**, as reported in **(1993) 3 S.C.C. 4**, the Apex Court held that bar of limitation to take cognizance of offence should not be absolute. It is the duty of the Court to consider the provisions of Section 473 whenever Section 468 of Code of Criminal Procedure is considered by the Court. In the aforesaid decision of this Court, it was also held that for urging grounds for condonation of delay, formal application was not *sine qua non* and oral submissions also could be considered.

9. Now, appreciating the facts of this case, the offence may be relating to revenue, at the same time the object and purpose for enacting provisions of limitation in criminal law must be appreciated in its true spirit. The object of introducing bar on filing prosecution is in consonance with the concept of fairness of

trial as enshrined in Article 21 of the Constitution. Parties are prevented filing criminal cases after long time, as a result of which material evidence may disappear. It is also ensured, by such provision, that the abuse of the process of the Court must be prevented by filing vexatious and belated prosecution long after the date of offence where accused might have lost his defense evidence.

10. When bar to take cognizance of offence on account of limitation is not made absolute, the provisions in shape of proviso like Section 473 also must not be loosely made applicable to each case. True it is that under Section 473, no application for explanation of delay is necessary and delay can be explained orally. Any how, re-appreciating the facts of this case, as to whether delay caused requires to be condoned, the only conclusion which is deducible is in the negative. Knowing fully well that the complaint is beyond the period of

limitation, no explanation is offered for causing delay nor sufficient ground appears to have been urged in this respect, thereafter, also. Therefore, this is not a fit case wherein delay cause can be condoned in the first part of Section 473 of the Code of Criminal Procedure. The facts are not such as to be covered by the phrase “or that is necessary to do so in the interest of justice” of Section 473 of Code of Criminal Procedure. True it is that after putting the bar on taking cognizance of any offence on account of limitation, law authorizes a discretion in favour of the courts to ignore the bar of limitation, if it is necessary to do so in the interest of justice. Undoubtedly the phrase used “it is necessary to do so in the interest of justice” is much wider phrase and much is left to the discretion of the Court to exercise ignorance of limitation in proper cases. That does not mean that this discretion is to be used arbitrarily. The

exercise of the discretion warrants keeping in mind object and purpose of enacting a statute. A balance has to be struck between right which accrued to the accused and exercise of discretion by the Court ignoring the provisions of bar of limitation. Therefore, this balancing must be a careful and in rare cases where interest of justice so requires. Recourse to the words “interest of justice” should not be taken unless there are compelling and justifiable reasons for invoking extra ordinary powers to waive bar of limitation. If applying bar of limitation, justice in general is made casualty, it becomes duty of the Court to uplift the cause of justice. The purpose of clothing the Courts with such discretion is to see that interest of justice is the prime and supreme. On face of the facts, it may appear that there is huge evasion of revenue of local authority, but on careful scrutiny and balancing the facts with the objects and

purpose of concerned provisions, it appears that the offence is made punishable with fine only which would attract the limitations of six months. This is so because Panchayats were authorized to recover octrois by coercive methods enshrined in the Gujarat Panchayat Act, 1993 and this penal provision is simultaneous provision. The prosecution can be launched within those six months. If not launched accused is exempted from prosecuting. Therefore, law requires vigilance on the part of concerned local authority. Perhaps in proper cases, when it is shown that exempting the accused from prosecution would not be in the interest of justice, the Court may use discretion. The instances of exercising discretion are cited by the learned advocate for the applicant of non-contribution of employees provident fund by the employer, evasion of sales tax and wrongful withholding the Company's property. Therefore, the question

whether it is necessary to overlook bar of Section 468 depends upon the facts of each case and facts of this case, as discussed above, do not warrant overlooking, the bar of Section 468.

11.The Magistrate, undoubtedly, issued process against the accused, but that would not automatically condone the bar put by Section 468. When it is held that the complaint is time barred the whole proceedings are without competence and void ab-initio. Therefore, by no stretch of reasoning it can be said that because, the process is issued by the Magistrate of time barred complaint, the bar of Section 468 of Cr.P.C. is overlooked and delay is condoned.

12.Special Act overrides the general Act. This is the submission. But this submission would be relevant only, in this case, when any period of limitation is prescribed by the Special Act. In those circumstances period of limitation would

be as prescribed in Special Act and the provisions of general Act would not apply. However, when Special Act does not provide any limitation for prosecution, then period of limitation as prescribed in general Act would prevail.

13.In the result, in the inherent powers of this Court, I do not find any fault with both the orders passed by the learned Judicial Magistrate (F.C.), Sankheda as well as Fast Track Court No.13, Vadodara. The application, therefore, stands dismissed summarily.

[J. R. VORA,J.]

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